

Internal Revenue Service

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Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:ITA:B04

PLR-148894-11

Date:

May 15, 2012

In re:

LEGEND

College =

Trustee =

State1 =

Court =

State2 =

C =

B =

D =

E =

v =

w =

x =

y =

z =

year 1 =

year 2 =

year 3 =

Date 3 =

Date 4 =

Date 5 =

Date 6 =

Date 7 =

Date 8 =

Dear _____ :

This is in reply to your request for a ruling dated November 7, 2011, that you are not required to include in income under the anticipatory assignment of income doctrine an assignment in a judgment under appeal, as described below.

FACTS

You and College hold w and x percent beneficial interests, respectively, in a trust (the Trust) created under the will of C. The initial beneficiary of the trust, B, had sued Trustee for breaching multiple fiduciary duties, including its failure to diversify Trust assets ("the Lawsuit"). However, B died in year 1 and bequeathed the Trust principal and undistributed income to you and College. You and College were substituted as parties in the Lawsuit in B's place.

You and College are represented by counsel. In year 2, you assigned to your then counsel, D, y percent of your recovery in the Lawsuit if it is concluded without appeal, and z percent of your recovery if it is concluded after appeal (the D Assignment). Although you assigned to D a partial interest in the proceeds of your recovery, you retained all rights under State1 law to control of the Lawsuit. You represented that you have paid (or will pay before the effective date of the D Assignment) all disbursements and expert fees incurred on your behalf under the Date 5 fee agreement with D and confirmed in the Date 8 agreement with E.

On Date 3, the Court found that Trustee was negligent in its management of Trust's investments. On Date 4, the Court ordered that Trustee be surcharged \$v, plus interest, and that Trustee refund certain commissions. On Date 6, Trustee filed its notice of appeal and, on Date 7, you and College filed a notice of cross appeal. The appeal is currently pending.

D died in year 3. Since then, E has represented you and College on the same terms as the contingent fee arrangement they had with D. E and the Estate of D have separately agreed to divide the contingent fee.

PROPOSED TRANSACTION

You have executed a contingent assignment to College of all of your right, title, and interest in Trust, including:

- Your interest in the Lawsuit and any recovery from the Lawsuit, and all rights to the Lawsuit not previously assigned under the D Assignment; and
- Your right to be reimbursed for any costs advanced in pursuing the Lawsuit.

The contingent assignment will only become effective if the Internal Revenue Service rules favorably on the rulings requested before a final settlement of the Lawsuit or the expiration of the appeals period. College accepts the assignment subject to the contingency and the D assignment, and will be substituted as the sole client. You represent that the contingent assignment will be governed by and is valid under State2 law. You also represent that the assignment would be valid under State1 law. You also represent that Trust's terms do not restrict the transfer of interests in the Trust.

When the contingent assignment becomes effective, you, College, the Estate of D, and E will execute a release and novation agreement ("the Novation"). Under the Novation, you will be released from all of your obligations under the D Assignment and the contingent fee arrangement in consideration for College's agreement to pay all attorneys fees and costs attributable to a recovery from the Lawsuit. After the effective date of the contingent assignment, you will cease to be a client of either D or E, and will not be responsible for attorneys' fees or costs. Payment of E's contingent fee and related costs will be collected solely from the recovery payable to College.

LAW AND ANALYSIS

Section 61(a) of the Internal Revenue Code provides that, except as otherwise provided, gross income means all income from whatever source derived.

In general, under the anticipatory assignment of income doctrine, a taxpayer who earns or otherwise creates a right to receive income will be taxed on any gain realized from it, if the taxpayer has the right to receive the income or if, based on the realities and

substance of the events, the receipt of the income is practically certain to occur (*i.e.*, whether the right basically has become a fixed right), even if the taxpayer transfers the right before receiving the income. *Ferguson v. Commissioner*, 174 F.3d 997 (9th Cir. 1999); *Jones v. United States*, 531 F.2d 1343, 1346 (6th Cir. 1976); *Kinsey v. Commissioner*, 477 F.2d 1058, 1063 (2d Cir. 1973); *Hudspeth v. United States*, 471 F.2d 275, 280 (8th Cir. 1972); *Estate of Applestein v. Commissioner*, 80 T.C. 331 (1983); *Lucas v. Earl*, 281 U.S. 111 (1930). In contrast, the mere anticipation or expectation of the receipt of income is insufficient to conclude that a fixed right to income exists. *S.C. Johnson & Son, Inc. v. Commissioner*, 63 T.C. 778, 787-88 (1975).

With respect to the assignment of claims in litigation, a review of the case law shows that anticipatory assignment of income principles require the transferee to include the proceeds of the claim in gross income where recovery of the transferred claim is certain at the time of transfer, but not where recovery of such claim is doubtful or contingent at the time of transfer. In *Doyle v. Commissioner*, 147 F.2d 769 (4th Cir. 1945), a taxpayer assigned 60 percent of a claim that he owned to his wife and children after the Court of Claims denied application for a new trial and the Supreme Court of the United States denied taxpayer's petition for a writ of certiorari. The government argued that, after the denial of certiorari and before the transfer to the wife and children, the gain that the taxpayer expected to receive was "practically assured" and, thus, its transfer resulted in an anticipatory assignment of income. *Doyle*, 147 F.2d at 772. The court, agreeing with the government's argument, held that the taxpayer was in receipt of the profits on his purchase of the interest in the lawsuit because, at the time he made the gifts of his interest in the lawsuit, such profits "had already been rendered *certain* by the judgment of the Court of Claims and denial of certiorari by the Supreme Court." *Doyle*, 147 F.2d at 773. (Emphasis added.)

Like *Doyle*, *Cold Metal Process Co. v. Commissioner*, 247 F.2d 864 (6th Cir. 1957), *rev'g* 25 T.C. 1333 (1956), follows the view that a taxpayer's right to income on a judgment is not earned or does not ripen until all appeals with respect to the judgment have been exhausted. *Cold Metal* demonstrates the doubtful and contingent nature of a lower court judgment during the time an opposing party is prosecuting appeals. Citing to *Harrison v. Shaffner*, 312 U.S. 579 (1941), the court stated, "[T]he rule applicable to an assignment of income applies when the assignor is entitled at the time of the assignment to receive the income at a future date and is vested with such a right." *Cold Metal*, 247 F.2d at 873. In *Cold Metal*, the court held that, notwithstanding a district court's opinion for the taxpayer in a cancellation suit, as of the end of that year it had only a "contingent right to income ... payable if at all, at some indefinite time in the future in an indeterminate amount, with respect to which the assignor had no voice or control whatsoever ..." *Cold Metal*, 247 F.2d at 873. Thus, *Cold Metal's* assignment did not result in an assignment of income. See also *Jones v. Commissioner*, 306 F.2d 292 (5th Cir. 1962) and *Schulze v. Commissioner*, T.C. M. 1983-263.

The above-cited line of cases support the proposition that, in general, a transferor who makes an effective transfer of a claim in litigation to a third person before the time of the expiration of appeals in the case is not required to include the proceeds of the judgment in income under the assignment of income doctrine because such claims are contingent and doubtful in nature.

Based on the information submitted and representations made, your assignment becomes effective only if this letter is issued before the earlier of (i) the expiration for the appeals period of the Lawsuit or (ii) the date of a final settlement of the Lawsuit. Thus, your assignment will occur, if at all, only before any judgment or settlement is final, and during the time that the claims are contingent and doubtful in nature.

CONCLUSION

Accordingly, based strictly on the information submitted and each representation made (including the representation that the assignment is valid under State1 and State2 law), any proceeds that are paid to College at the conclusion of the appeals process, including any part of the judgment used to pay attorneys fees, will not be includible in your income. In addition, you will not realize any income from the assignment.

CAVEATS

Except as expressly provided in the preceding paragraph, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. For example, we do not express any opinion concerning the College's payment of the expenses of this ruling request.

These rulings are directed only to the taxpayer requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

The rulings contained in this letter are based upon information and representations that you submitted under penalties of perjury. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

You must attach to any income tax return to which it is relevant a copy of this letter or, if you file your returns electronically, include a statement providing the date and control number of this letter ruling.

In accordance with the Power of Attorney on file with this office, we are sending a copy of this letter to your authorized representative.

Sincerely,

Michael J. Montemurro
Branch Chief
Office of Associate Chief Counsel
(Income Tax & Accounting)